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IN THE

Supreme Court of the United States

No.

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BILL J. GAMBOCZ,

Petitioner,

vs.

JOHN W. ELLMYER, JR., LILLIAN APEL, LOUIS LA PLAGA and MARIE KELLER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit of March 5, 1971.

OPINION

The opinion of the United States Court of Appeals for the Third Circuit bearing Case No. 19,047 and dated March 5, 1971 is appended below.

JURISDICTION

This is a petition for a writ of certiorari to review an Order of the United States Court of Appeals for the Third Circuit of March 5, 1971. A certified judgment in lieu of formal mandate was issued on March 5, 1971. This court

has jurisdiction to review the order and judgment of the United States Court of Appeals for the Third Circuit by reason of 28 U.S.C.A. sec. 1254.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment right to due process of law, equal protection of law, and the equal privileges and immunities as guaranteed to a United States citizen, apply to protect the Seventh Amendment right to trial by jury, when a litigant is precluded from having a trial on the merits by an "Order of Dismissal with Prejudice", which was acquired by a perpetrated fraud upon the Court?

2. Does the one year limitation provision of F.R.C.P., *Rule* 60(b), operate to bar the petitioner's motion to vacate and set aside a fraudulent order entered against him, without notice to the said petitioner as required pursuant to New Jersey Court Rules, *Rule* 4:42-1, and therefore without giving the petitioner opportunity to consent to form?

3. Does the one year limitation provision under *Rule* 60(b) bar the petitioner from the relief sought by him in view of the fact that he was neither given nor did he ever receive any notice prior to entry of judgment as required by F.R.C.P., *Rule* 77(d)?

4. Was the petitioner's constitutional procedure of due process of law, along with his constitutional substantive rights denied him when the "Final Order of Dismissal with Prejudice" was decided *ex parte*, and thereafter never sent notice of the judgment prior to its entry?

5. Is the petitioner entitled to relief, which was denied him, by violation of the requirements under N.J.C.R., *Rule* 4:42-1, and F.R.C.P., *Rule* 77(d)?

6. Is this case reviewable as provided by Sec. 1984 of Title 42, U.S.C.A., by the Supreme Court of the United States, under the same provisions and regulations as are provided by law for the review of other causes in said Court?

CONSTITUTIONAL PROVISIONS INVOLVED

1. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved. . . ." *United States Constitution*, Amendment No. 7.

2. ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law." *United States Constitution*, Amendment No. 14.

STATEMENT OF CASE

Bill J. Gombocz, the petitioner, prior to August, 1965, received the nomination in a primary election to run against the incumbent for the office of Mayor of Edison, New Jersey. The incumbent Mayor, Gambocz's opponent for the office of Mayor was also Director of the Police Department.

On August 31, 1965, just prior to the general election, Mr. Gambocz was seized and arrested by the Edison Police, was taken to police headquarters, forced to empty his personal belongings from his possession, thereafter, thrown down a flight of stairs to the basement floor; thereafter he was finger printed, the police took mug shots and entered him on the police blotter, and then was forced to post bail to gain his freedom from incarceration.

The aforesaid arrest and incarceration was based upon an allegation by one of the respondent's, Mrs. Keller, named in the petitioner's suit, that he the petitioner had drawn a check for $55 payable to the said Mrs. Keller for which there were insufficient funds, nearly two years after the issuance of the check; whereupon the police did induce the complainant, Mrs. Keller by artifice and trickery, perpetrated through the direction of Mr. Gambocz's opponent, the incumbent Mayor who was also Director of the Police Department, to sign a complaint against the petitioner, Mr. Gambocz, which complaint the Court Clerk permitted and induced Mrs. Keller to sign in blank, and which was witnessed by that said Court Clerk, also in blank; and only thereafter, were allegations and charges doctored up into the body of the complaint. Further, in perpetration of the issuance of this fraudulent complaint, the complaint was sworn to and attested by the Court Clerk in the name of a

Magistrate who had disqualified himself from appearing in the matter. Whereupon, the complaint and the complainant's statement were simultaneously released to the press. Mr. Gambocz, the petitioner, was held over for the Grand Jury, which saw fit to enter *"No Bill"* two weeks after the general election. To all of the aforesaid stated, it cannot be denied that the citizens of Edison were denied a *bona fide* general election.

On January 3, 1968, Mr. Gambocz's attorney entered a complaint and demand for trial by jury against the said respondents under the "Civil Rights Act", pursuant to the provisions of Sec. 1983 and 1985, of Title 42, U.S.C.A., and Sec. 1331 and 1343 of Title 28, U.S.C.A., in the United States District Court for the District of New Jersey.

Thereafter, on or about October 17, 1968, the petitioner's attorney informed him that he could not and would not represent him any further in the litigation before the Court, for respondents' counsels were insistent that he remove himself from the case under Canon #19 of the Canons of Professional Ethics of the American Bar Association, because they alleged he was to be an essential witness to a crucial fact issue in the case.

Because of the fact that the petitioner was left without benefit and aid of legal counsel he did set forth a motion on October 25, 1968, requesting the Courts permission to withdraw his pending action pursuant to federal Rule, *Fed. Rules Civ. Proc., Rule* 41(a)(2), 28 U.S.C.A.

On October 28, 1968, the Court did entertain argument on the motion of the petitioner, with the petitioner, and counsels for the respondents present in Court, thereafter, at the conclusion of the argument, "no objections" being voiced by the respondents the Court did dismiss as a matter of law the pending action "without prejudice".

Thereafter, on or about March 28, 1970, the petitioner prepared to enter suit against the respondents, and on checking the files of the original suit of January 3, 1968, in the United States District Court found that a final order of dismissal, which was prepared and submitted by his adversaries to the Court, and was entered into judgment on November 8, 1968, contrary to the Courts' ruling of October 28, 1968, that being "without prejudice".

The petitioner on discovery of the aforesaid did file on April 10, 1970, a notice of motion to the Court for an order to vacate and set aside the final order of dismissal with prejudice of November 8, 1968; on May 11, 1970, the Court did hear argument, and at the conclusion, the Court did deny the petitioner's motion.

The order of the District Court of May 15, 1970, denying the petitioner's motion to vacate and set aside the order of dismissal with prejudice was appealed to the United States Court of Appeals for the Third Circuit on May 18, 1970; on January 8, 1971, the appeal was argued and on March 5, 1971, the Third Circuit did file its opinion which affirmed the judgment of the District Court.

The opinion of the Third Circuit, which is appended hereto, is totally grounded on the sole bases that, "The simple answer to the appellants situation here is that he is barred by the one-year limitation under *Rule* 60(b)".

[The following is the factual account of the dissmissal of the petitioners' pending action before the District Court, which is contained in the Joint Appendix, as submitted with "Brief for Plaintiff-Appellant" to the Third Circuit in the matter of Bill J. Gambocz, Plaintiff-Appellant, vs. John D. Ellmyer, Jr., Lillian Apel, Louis La Plaga, and Marie Keller, Defendants-Appellees, Docket #19,047, the same

transcript citations are again utilized herein, and they begin by the letter T.]

It is important to note the following colloquy of the argument before the District Court on October 28, 1968, involved in the petitioner's request to withdraw his pending action, its sequence being:

A. The trial Judge stated:

> "I received, I believe a letter from your, or signed with your name, that the case was withdrawn" (T-2a).

Petitioner did respond by stating:

"Yes Sir" (T-2a).

B. The court asked of counsel:

> "Is there any opposition to the dismissal of this action" (T-2a).

Counsels response were:

"*No objection*" (T-2a).

C. Prior to any further discussion or any decision of the Court, an inquiry was made into the relationship between the petitioner and his attorney, when the Court did ask:

> "Have you asked him for a release of his claim for a fee for the representation of you which he has already accorded" (T-4a).

The petitioner informed the Court:

> "Yes, sir, I did, and he would send it to me" (T-4a).

Upon this the Court did release the petitioners' attorney in accordance with United States District Court for the District of New Jersey Local Rule 18, when it stated:

> *"I will give you a release so you are in the clear with Mr. Holley"* (T-4a).

D. The crucial point of the Court proceedings developed when respondent's counsel did request cost, and then the Court asked of them:

> "Has either counsels for the opponents to the motion argued the question of the right of the litigant under these circumstances to dismiss his own case" (T-5a)?

Counsels responded by stating:

> *"No, your Honor, we have not"* (T-5a).

Then the Court informed all present:

> "All right, I'll mark the case ready, Mr. Gambocz, and when it is reached, we will discuss the new aspect, namely, the insistence that cost be allowed you; and also, I understand you are insistent that motion for summary judgment be adjudicated even though the plaintiff . . ." (T-5a).

Counsel for respondents interrupted the trial Judge, and immediately, by their own volition elected to withdraw their request of cost, and adjudication of summary judgment, thereupon the Court made the following pronouncement:

> *"Case will be dismissed"* (T-5a).

On May 11, 1970, the day of the argument, before the Court in which the petitioner set forth his motion to vacate and set aside the order of November 8, 1968, it was abundantly clear that counsels chose to ignore the ruling of the Court of October 28, 1968, and decided to deliver an *ex parte* order, because, respondents' did state in respect to the dismissal the following:

> "Your Honor, then said, 'Why do you gentlemen want costs.' I think Mrs. Kellers' attorney said, 'Because I think I am entitled to it. We have been through this barn too many times now.' Your Honor said, 'I'll hold it for argument later in the morning', *whereupon I submit that in an effort to save time, and not have to wait until the case was then reached for argument on the merits,* the attorney for Mrs. Keller said, 'Well, we will forego our application for costs', *Your Honor, then said case dismissed*" (T-16a).

Further, if any doubt exists as to the nature of the dismissal, respondents' counsel confirmed it quite readily when it stated:

> *"Now, it is a fact that your Honor did not say on that day with or without prejudice"* (T-15a).

The candor of respondents' counsel was quite a revelation as to its bases for rendering an *ex parte* decision when he stated:

> "Everybody assumed, I believe that it was with prejudice" (T-16a).

Even though the Court held in *Ziegler v. Railroad Co.*, 59 Ala. 599:

> *"If any question of fact or liability be conclusively presumed against him, this is not due process of of law."*

Aside from the fact that respondents' counsels did render *an ex parte order, which has never been denied,* the Third Circuit failed to comment upon the following additional 2 points asserted by the petitioner, which to this date stand uncontradicted or denied:

1. That counsels *never did submit to the petitioner a consent as to form* for his signature, contrary to New Jersey Court *Rule* 4:42-1, which states:

> "no order shall be signed by the Court unless, the form thereof has been settled on motion or notice to all parties affected thereby", or unless the written approval of such attorney for the parties to the form thereof is endorsed thereon."

2. Counsels *never did send notice of the order* as prepared by them to the petitioner prior to entry of judgment as required by F.R.C.P., *Rule* 77(d).

Mr. Justice Black and Mr. Justice Douglas in a separate opinion in the case of *Klapprott v. United States of America,* 335 U.S. 601, 69 S. Ct. 384, 93 L. Ed. 266, did concur and state with respect to review of an appeal where allegations are undenied, the following:

> "In considering whether a petition to set aside a default judgment was improperly dismissed, *undenied allegations must be accepted as true.*"

REASONS FOR GRANTING THE WRIT

It is axiomatic that the granting of a petition for a writ of certiorari lies entirely within the discretion of the Court. *Denver v. New York Trust Co.*, 229 U.S., 123 (1913). However it is submitted that this discretion should be exercised in the within matter for three reasons.

First, the Supreme Court of the United States has spoken on the subject of whether the Fourteenth Amendments' protection applies to the Seventh Amendment right to trial by jury, when the Court did set forth a clear and decisive opinion in respect to *Rule* 60(b), which to this date has been meticiously adhered to by the Courts as the applicable and landmark decision in respect to the federal question of *Rule* 60(b), the Court did state in *Bridoux v. Eastern Air Lines*, 214 F.2d 210:

> "But the Rule does bring to bear a more liberal attitude then pertained before its adoption. *Klapprott v. United States*, 335 U.S. 601, 69 S. Ct. 384-93 L. Ed. 266. (opinion of Mr. Justice Black in which Mr. Justice Douglas joins) It is there said, 335 U.S. at pages 614-615, 69 S. Ct. at pages 390, that "Other reason" clause of *Rule* 60(b) to which we have referred. N. 3, *supra*, enables a court to vacate a judgment whenever such action *"is appropriate to accomplish justice."* The discretion which undoubtedly resides with the trial judge must be considered with this in mind as well as the principle,
>
> "• • • Since courts universally favor trial on the merits, *slight abuse* of discretion in refusing to set aside a default judgment is sufficient to justify a reversal of the order."
>
> *Madson v. Petrie Tractor & Equipment Co.*, 106 Mont. 382, 77 P. 2d 1038, 1040."

In light of the foregoing landmark precedence, it is abundantly clear that the Third Circuit totally ignored the principles heretofore expoused by the Supreme Court of the United States. Therefore, underlying the petitioners' request for review by the Court of this writ of certiorari is *Rule* 19(b), at page 3501, line 6, *Moore's Fed. Rules Practices*, as amended 1968, has decided a federal question in a way in conflict with applicable decisions of this Court.

Secondly, the Third Circuit in rendering its opinion departed far afield from the accepted and usual course of judical proceedings as stated by precedents, statutes, and the rules, for the opinion of the Third Circuit did patently err for a number of reasons. Certiorari must be granted to reverse these otherwise irrevocable errors, as the petitioner has no other recourse. The Blatant errors include:

(1) the Third Circuit failed to recognize the fact that by virtue of the entry of the *ex parte* order, an order contrary to the Courts' ruling, a fraud thereby had been perpetrated upon the Court.

(2) the Court failed to take into account the fact that the petitioner was never served wih a consent to form for his signature as required by *New Jersey Court Rule* 4:42-1,

(3) and finally, that the Court did not take judicial note that the petitioner was never served with notice of the order prior to entry of judgment as required under F.R.C.P., *Rule* 77(d).

As apparent ("apparent", because the aforesaid 3 issues which were alleged by the petitioner remain undenied, and must be accepted as true) as the facts are, the opinion of the United States Court of Appeals for the Third Circuit in the present matter did rest upon *Karl Boehm, et al. v. Office of Alien Property*, 344 F.2d 194;

and *Ackerman v. United States,* 340 U.S. 193, 202. However, these are not even close to being in point. On the contrary, *Ackerman v. United States, supra,* 95 L.Ed. at 209 supports the petitioners position, when the Supreme Court of the United States did state in reference to *Rule* 60(b):

> "This rule does not limit the power of a Court to entertain an independent action to relieve a party from judgment, order or proceeding, *or to grant relief to a defendant not actually personally notified as provided in Sec. 57 of the Judicial Code, USC, Title 28, Sec. 118, or to set aside a judgment for fraud upon the Court.*"

Thirdly, when the United States Court of Appeals for the Third Circuit did render its opinion, it flatly stated: "The simple answer to the appellants' situation here is that he is barred by the one-year limitation under *Rule* 60(b) . . .", and in so doing *rendered a decision in direct conflict* with the United States Court of Appeals for the Eighth Circuit, when that Court did render its opinion in the case of *Conerly v. Flower,* 410 F.2d 943, on May 14, 1969. The Eighth Circuit did state on page 943:

> "We think defendants argument misconstrues the respective procedure involved. *Rule* 59(e) provides that judgment can be amended or altered only within 10 days of its entry in order to provide finality for purposes of appeal. In this sense it is similar to a motion for new trial under *Rule* 50(b): the time for appeal is tolled by the filing of a motion within the requisite time. *Under Rule 60(b) on the other hand, the problem of finality is not involved; a motion under Rule 60 (b) does not affect the time for appeal nor the finality of judgment itself.*"

Further, the Eighth Circuit did state on page 942:

> "In granting affirmative relief under this rule providing for vacation of Judgment in event of fraud, trial Court is given broad discretion as to type of relief it might grant and is given express authority to impose just terms, but this does not mean that court may circumvent due process or U.S.C.A. Const. Amend. 7 and award damages or make finding without an evidentiary trial on the merits."

Amended *Rule* 60(b) provides:

> "On motion and upon such terms as just, the court may relieve a party or his legal representative from a final judgment, order, or proceding for the following reasons: (1) . . . . ; (2) . . . .; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other conduct of an adverse party, ... ; or (6) any other reason justifying relief from the operation of the Judgment; . . . . *A motion under this subdivision (b) does not affect the finality of a Judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a Judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, USC, Title 28, Sec. 118 or to set aside a judgment for fraud upon the court.*" . . . ."
>
> *Klapprott v. United States of America*, 335 U.S. 601-631; 93 L. Ed. 266 at 274.

If the judgment of the Third Circuit is permitted to stand, justice will have been denied to this petitioner, and all prospective petitioners before the Bar will no longer be guided by what was heretofore a clear and directing beacon in the cause of justice. Instead the precedents

established by the *Rule* 60(b), and the landmark decisions which followed will be rendered impotent, repugnant, and void. The petitioner respectfully petitions this Court to grant a review of this writ in the interest of justice and fair play.

CONCLUSION

For the above reasons it is respectfully submitted the within petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

/s/ Bill J. Gambocz
BILL J. GAMBOCZ
Pro Se.

Dated: April 30, 1971

APPENDIX

Opinion of the Court
(Filed March 5, 1971)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,047

BILL J. GAMBOCZ,

Appellant,

vs.

JOHN W. ELLMYER, JR., LILLIAN APEL, LOUIS LA PLAGA and MARIE KELLER

(D. C. Civil Action No. 8-68)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued January 8, 1971

Before GANEY and ADAMS, *Circuit Judges*, and WEIS, *District Judge*

GANEY, *Circuit Judge.*

In order to understand fully the position of the appellant here, it is necessary to put the matter in its proper perspective.

On March 4, 1966, the appellant filed a complaint against Lillian Apel, Louis La Plaga, John W. Ellmyer, Jr., George Miller, Richard McGinnis, Theodore C. Woerner and the Township of Edison, a municipal corporation, in the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-19136-65, the first count alleging, inter alia, that he had given a check to one Marie Keller in the sum of $55 in May of 1964, and that upon her return from Europe, the check having been returned unpaid, all of the named defendants agreed and conspired to utilize the criminal processes of the courts of New Jersey, for the purpose of embarrassing appellant in his standing in the community; injuring his good name and credit, inasmuch as he was then a candidate for Mayor of Edison, on the Republican ticket; that John W. Ellmyer, Jr., one of the defendants, who was the Police Chief of Edison, maliciously and in order to pervert the criminal processes of the State of New Jersey, advised Marie Keller that the only way she could collect the money owed her was to place criminal charges against appellant and in order to do so, he arranged with her to go to the office of defendant Louis La Plaga, a policeman in Edison, and they transported her to the office of an attorney in the State of New Jersey, who was the campaign manager for appellant's opponent, who was running for Mayor, and caused her to fill out a complaint before the defendant, Lillian Apel, charging appellant with a criminal offense. Defendants, John W. Ellmyer, Jr., Richard McGinnis and Theodore C. Woerner, then went to the home of appellant's elderly mother and father and maliciously advised them that they were searching for their son, causing them great suffering and shock, although they knew the plaintiff resided and maintained a business at 1028 Amboy Avenue, in Edison. The Edison newspapers carried the news of the criminal charges against

plaintiff, embarrassing him and interfering with "his advantageous economic relation," causing him much mental anguish and forcing him to spend large legal fees and expenses.

The second count of the complaint stated an incorporation of the facts alleged in the first count of the complaint; that defendants conspired against plaintiff maliciously for the purpose of harming his standing in the community while all of the defendants were employed and acting within the scope of their employment by the said defendant, the Township of Edison.

The New Jersey Superior Court rendered an adverse decision on the merits of the case following the trial, and the plaintiff appealed it to the Appellate Division of New Jersey Superior Court, where that court unanimously affirmed the judgment of the court below, and he then filed a petition for certification to the New Jersey Supreme Court, which was denied. Plaintiff then proceeded in the United States District Court for the District of New Jersey, in the instant action, alleging the same operative facts in his complaint as he did in the complaint filed in the Superior Court of New Jersey, and which was finally denied by the Supreme Court of New Jersey, and on November 8, 1968, he asked the court to withdraw the suit which the court did and at the hearing, the court announced that it was dismissing the same. A few days later, in a regular order filed by him, the suit was dismissed with prejudice.

Plaintiff then brought the matter to the attention of the Joint Subcommittee on Claims in the New Jersey State Legislature and after hearing the matter, the Subcommittee rejected the claim. Subsequently, plaintiff filed an action

in the United States District Court against the Joint Subcommittee, which the court dismissed, and on appeal to this Court, the dismissal was affirmed in a per curiam opinion. Nineteen months after the entry of the order dismissing the cause of action with prejudice in the District Court of New Jersey, appellant filed a motion on May 11, 1970, to re-open the judgment, wherein he alleged that the order of November 8, 1968, entered with prejudice, was never brought to his attention, that while the order may have been sent to his counsel, his counsel never notified him of the said order and left sometime later for California, and that he never would have consented to the dismissal with prejudice had he known such an order would be entered. However, the court denied the motion. It is to be noted that at the time the order was sent by the Clerk of the Court to his counsel, he was then attorney of record.

The appellant must rely on Rule 60(b)[1] for his motion to vacate the judgment of the district court. It is apparent from reading the Rule that there is really no exception

---

[1] Rule 60(b) provides, in pertinent part, as follows:

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment. *The motion shall be made within a reasonable time, and for reasons* (1), (2), *and* (3) *not more than one year after the judgment, order, or proceeding was entered or taken. . . .*" (Emphasis ours.)

under which he can come, in order to get around the fact that more than one year had passed during which he would have had to file the motion. The simple answer to the appellant's situation here is that he is barred by the one-year limitation under Rule 60(b), and there is nothing this Court can do by way of extending it since he cannot come in under sections (1), (2) or (3)—section (6) may not be used as a catchall to avoid the one-year limitation. *Karl Boehm, et al. v. Office of Alien Property,* 344 F.2d 194; *Ackerman v. United States,* 340 U.S. 193.202.

Additionally, an examination of the complaint which he filed in Middlesex County, New Jersey, and which action went all the way to the Supreme Court of New Jersey, when scrutinized with the complaint which he filed in the District Court in this action, is merely a re-alleging of the operative facts in the New Jersey case. However, in view of the decision we reach here that he is barred by Rule 60(b), we need not proceed to any other ground such as estoppel by judgment.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment of the United States Court of Appeals
(Filed March 5, 1971)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,047

BILL J. GAMBOCZ,

Appellant,

vs.

JOHN W. ELLMYER, JR., LILLIAN APEL, LOUIS LA PLAGA and MARIE KELLER

(D. C. Civil Action No. 8-68)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ..... DISTRICT OF NEW JERSEY

Present:

GANEY and ADAMS, *Circuit Judges*
and WEIS, *District Judge*

This cause came on to be heard on the record from the United States District Court for the ..... District of New Jersey and was argued by counsel for appellee, and appellant, pro se.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 13, 1970, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ Thomas F. Quinn
THOMAS F. QUINN

March 5, 1971

Appellant's Notice of Motion for Rehearing En Banc
(Filed March 13, 1971)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NO. 19,047

BILL J. GAMBOCZ,

Plaintiff-Appellant,

vs.

JOHN W. ELLMYER, JR., LILLIAN APEL, LOUIS LA PLAGA and MARIE KELLER

Defendants-Appellees.

Notice is hereby given that the Appellant, Bill J. Gambocz, will petition the United States Court of Appeals for the Third Circuit for a Rehearing In Banc, on the Opinion of the United States Court of Appeals for the Third Circuit entered in favor of the Appellees in this action on March 5, 1971.

/s/ Bill J. Gambocz
BILL J. GAMBOCZ
Pro Se

Sworn to and subscribed before
me this 11th day of March 1971

/s/ Nicholas J. Genito
Notary Public of New Jersey
My Commission Expires December 28, 1972

Order Denying Appellant's Petition For Rehearing En Banc
(Filed April 6, 1971)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,047

BILL J. GAMBOCZ,

Appellant,

vs.

JOHN W. ELLMYER, JR., LILLIAN APEL, LOUIS LA PLAGA and MARIE KELLER

Present:

HASTIE, *Chief Judge*, GANEY, SEITZ, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, *Circuit Judges*, and WEISS, *District Judge*.

The petition for rehearing filed by BILL J. GAMBOCZ, the appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ William H. Hastie
WILLIAM H. HASTIE
Chief Judge

Dated: April 6, 1971

Motion by Appellant for Stay of Mandate
(Filed April 13, 1971)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DOCKET NO. 19,047

BILL J. GAMBOCZ,

Appellant,

vs.

JOHN W. ELLMYER, JR., LILLIAN APEL, LOUIS LA PLAGA and MARIE KELLER

Appellees.

Please take notice that the undersigned makes application to the United States Court of Appeals, for the Third Circuit, sitting at 2046 United States Court House, 9th & Chestnut Street, Philadelphia, Pa., 19107, for a Stay of Mandate to the above referred to Civil Action, pending application to the United States Supreme Court for a Writ of Certiorari for a period of thirty (30) days.

BILL J. GAMBOCZ
/s/ Bill J. Gambocz
Pro Se

Sworn to and subscribed before
me this 12th day of April 1971.

Notary Public of New Jersey
My Commission Expires November 7, 1971

Order Staying the Issuance of the Certified Judgment In Lieu of Formal Mandate
(Filed April 21, 1971)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 19,047

BILL J. GAMBOCZ,

Appellant,

vs.

JOHN W. ELLMYER, JR., LILLIAN APEL, LOUIS LA PLAGA and MARIE KELLER

(D. C. Civil Action No. 8-68)

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until May 13, 1971.

/s/ J. Cullen Ganey
J. CULLEN GANEY
Senior Circuit Judge

Dated: April 21, 1971

Docket Entries

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

CASE NO. 19,047

DATE	FILINGS—PROCEEDINGS
6-29-1970	Certified copy of Notice of Appeal rec'd May 26, 1970, filed. Record rec'd June 24, 1970, filed.
7- 1-1970	Certificate that Appellant raises question of Constitutionality, where U. S. is not a party, specifically to due process of law, etc. to Attorney General.
7- 9-1970	Appearance of Peter N. Perretti, Jr., Riker, Danzig, Scherer & Brown, for appellees, filed.
7-20-1970	Brief for appellant, filed.
7-20-1970	Appendix, filed.
7-24-1970	Appearance of John K. Cooper; Meth & Wood, for appellee, Marie Keller, filed.
8-17-1970	Affidavit of service of appellant's brief and appendix by hand on July 17, 1970, filed.
8-19-1970	Brief for appellees, Ellmeyer, Apel and La Plaga, filed. Affidavit of mailing on August 17, 1970 attached.
8-21-1970	Stipulation of counsel for appellees that all appellees shall rely upon the brief submitted

	by the firm of Riker, Danzig, Scherer and Brown, Esquires, filed. (Proof of service of above stipulation on appellant in letter dated August 24, 1970 by John K. Cooper)
9- 1-1970	Reply brief, filed. (25 copies)
9- 8-1970	Affidavit of Service, filed.
9- 8-1970	Submitted on above stipulation (Hastie, Chief Judge)
9-14-1970	Order (Hastie, Chief Judge) granting stipulation by Meth & Wood, Esqs., and Riker, Danzig, Scherer & Brown, Esqs., that all co-defendants shall rely upon the brief submitted by the firm of Riker, Danzig, Scherer and Brown, Esquires, filed.
1- 8-1971	Argued. Coram: Ganey and Adams, Circuit Judges and Weis, District Judge.
3- 5-1971	Opinion of the Court (Ganey and Adams, Circuit Judges and Weis, District Judge), filed.
3- 5-1971	Judgment affirming the judgment of the District Court, filed May 13, 1970, with costs taxed against appellant, filed.
3-10-1971	Bill of costs for appellee, filed. (3 copies) Proof of service attached.
3-13-1971	Petition for Rehearing En Banc and Opinion of the Court, filed. (25 copies) (for appellant)
3-23-1971	Certificate of service of above, filed.
4- 6-1971	Order (Hastie, Chief Judge, Ganey, Seitz, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, Circuit Judges and Weis, District Judge) denying petition for rehearing, filed.

4-13-1971 Motion by appellant for Stay of Mandate, filed. (4 copies) Certificate of service attached.

4-21-1971 Order (Ganey, Circuit Judge) staying the issuance of the certified judgment in lieu of formal mandate until May 13, 1971, filed.

Certification

I, THOMAS F. QUINN, Clerk of the United States Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original appendix and proceedings in this Court in the case of Bill J. Gambocz, Appellant vs. John W. Ellmyer, Jr., et al. No. 19,047 on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 27th day of April, 1971.

/s/ Thomas F. Quinn
Clerk of the U.S. Court of Appeals,
Third Circuit

SUPREME COURT, U.

IN THE

Supreme Court of the United

OCTOBER TERM 1970

No. 1676

BILL J. GAMBOCZ,

Petitioner,

vs.

JOHN W. ELLMYER, JR., LILLIAN APEL, LOUIS LA PLAGA and MARIE KELLER,

Respondents.

On Petition for Writ of Certiorari

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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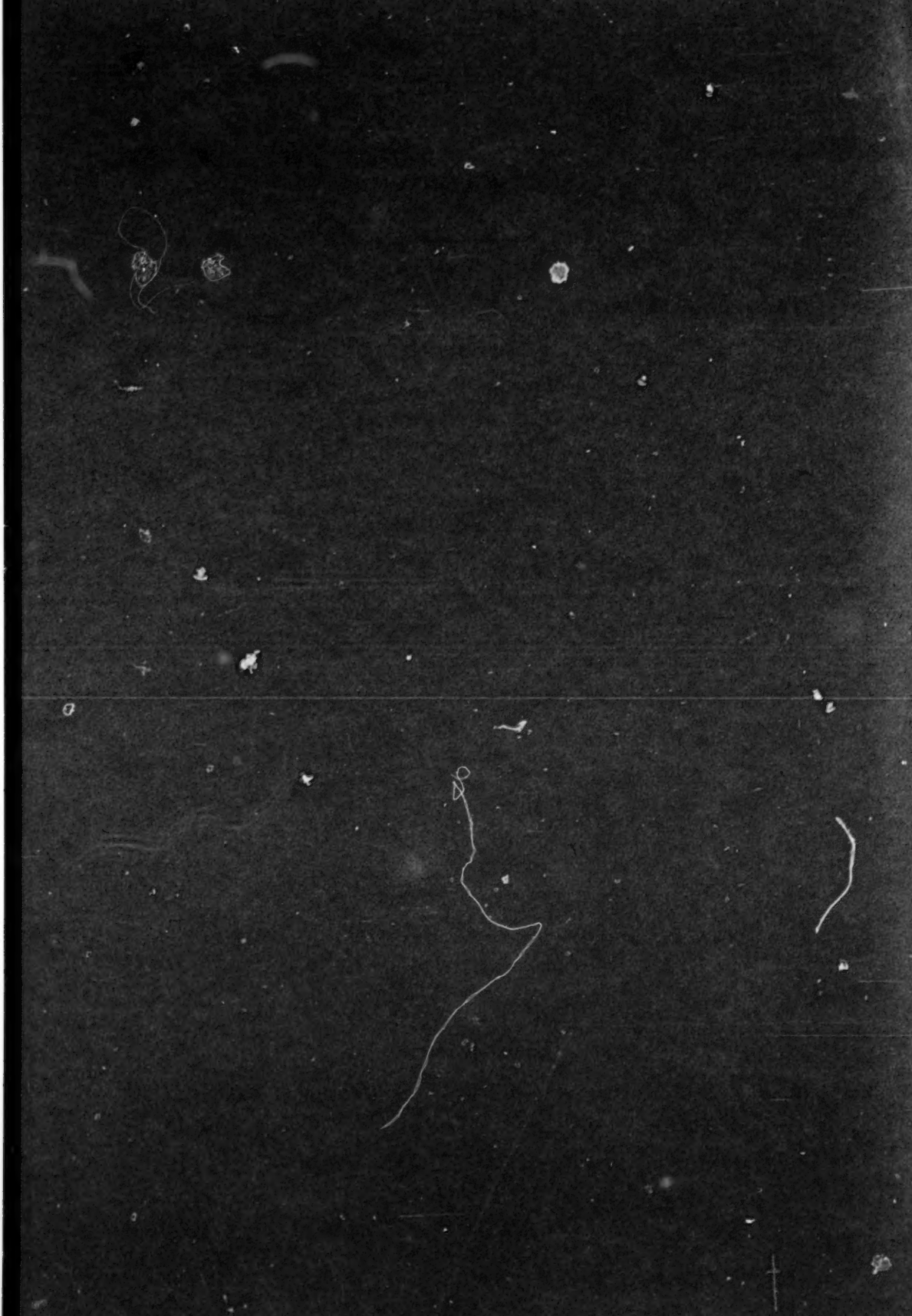
FRANK J. MISKE,
On the Brief.



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IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 1676

BILL J. GAMBOCZ,

Petitioner,

vs.

JOHN W. ELLMYER, JR., LILLIAN APEL, LOUIS LA PLAGA and MARIE KELLER,

Respondents.

On Petition for Writ of Certiorari

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counter-Statement of Constitutional Provisions Involved

There are no consitutional provisions involved.

Counter-Statement of the Questions Presented

1. Does the petition present special and important reasons for review on certiorari?

2. Does the petition present any cognizable questions for review?

3. Did the Circuit Court of Appeals abuse its discretion when it affirmed the judgment of the District Court, denying the plaintiff relief under Rule 60(b) from a final order entered some 19 months previously, particularly under the unique and somewhat unprecedented circumstances of this case and the multiplicity of litigation surrounding it?

Counter-Statement of the Case

The petitioner is or was an insurance agent or broker. In 1964 he had business dealings with the respondent, Marie Keller, and her husband, Leroy Keller, now deceased, in connection with which the petitioner issued a check to Keller on May 26, 1964. Within a few days after receiving the check, the respondent Keller went to Europe where her husband was stationed while on military duty, and deposited the check for collection. The check was ultimately returned to Keller because of insufficient funds in the petitioner's account. Keller and her husband made several attempts to have the petitioner make good on the check, but petitioner failed or refused to do so.

In August 1965 the respondent Keller returned to this country after the death of her husband. She then commenced criminal proceedings against the petitioner for having issued a check without sufficient funds on deposit to cover its payment upon presentment. Thereafter, the

petitioner apparently contacted Keller, either personally or through his New Jersey attorneys, Holley and Kroner, and requested that she withdraw the charge and accept payment on the check. The petitioner then delivered to Keller, a general release which he had signed on September 25, 1965. The release was notarized and acknowledged as having been voluntarily made by the petitioner before Lee A. Holley, Esq., who was then his attorney.

Subsequently, on March 8, 1966, the petitioner commenced a civil suit for damages in the Superior Court of New Jersey, Law Division, Middlesex County, against Lillian Apel, Court Clerk of the Municipal Court of the Township of Edison; John W. Ellmyer, Jr., Chief of Police of Edison Township; George Miller, Richard McGinnis and Theodore C. Woerner, Police Officers of Edison Township; and the Township of Edison, a New Jersey municipal corporation (R1a). The first count of the petitioner's complaint alleged an abuse of process and/or a malicious prosecution arising out of the criminal proceedings involving the check for insufficient funds, while the second count alleged a conspiracy among the defendants in furtherance of the tortious conduct pleaded in the first count. All of the defendants answered the complaint, and denied its allegations. The case subsequently proceeded through an extensive and thorough discovery period and a pretrial conference, as required by the New Jersey Court Rules.

The case was tried in April, 1967, and resulted in a mistrial. A second trial commenced September 25, 1967, and that trial resulted in the entry of an order for judgment in favor of the defendants and against the plaintiff at the conclusion of the plaintiff's proofs. See *New Jersey Court Rules*, Rule 4:40-1.

Thereafter, petitioner appealed the adverse judgment to the Superior Court of New Jersey, Appellate Division, and that court, in a reported opinion, unanimously affirmed the result below. See *Gambocz* v. *Apel, et al.,* 102 N. J. Super. 123 (App. Div. 1968). Thereafter, the petitioner filed a petition for certification with the Supreme Court of New Jersey and this petition was denied on September 17, 1968. See *Gambocz* v. *Apel, et al.,* 52 N. J. 485 (1968). Thus, it is fair to say that with regard to the operative facts and transactions which were or could or should have been set forth in the complaint with which the petitioner instituted his action in the Superior Court of New Jersey, the petitioner obtained a trial on the merits, including subsequent appellate review of the results of that trial, in complete accordance with the rights granted him under the New Jersey Constitution. The sum and substance of the outcome of the New Jersey Superior Court litigation is summarized in the last sentence of the Appellate Division's opinion, *supra* 102 N. J. Super. at p. 133:

> "*A fortiori,* there is no reasonable basis to permit a jury to find that defendants collectively engaged in any conspiracy to harm the plaintiff."

Not content with the adverse determination rendered by the New Jersey courts on the merits of his claim, on January 3, 1968 the petitioner filed a complaint in the United States District Court, District of New Jersey (R9a), which complaint commenced the action for which petitioner now seeks review on certiorari. The law firm of Holley and Kroner represented the petitioner in this action, as it had represented him previously in the New Jersey Superior Court action.

An analysis of the complaint in the action now under review will reveal that it is based upon the same opera-

tive facts and transactions which served as the basis of the action previously commenced in, tried before and determined by the New Jersey courts. Of course, the United States District Court complaint attempted to mold the same operative facts and transactions which had undergirded the prior New Jersey Superior Court tort action into a federal civil rights tort. See "Constitutional Tort: Monroe v. Pape, and the Frontier Beyond," 60 *Northwestern University Law Review* 277. But aside from these transparent allegations, if any new or different allegations appear to be set forth in the United States District Court action, these new or different allegations are matters which still pertain to the same operative facts and transactions and, therefore, could or should have been pleaded in the New Jersey action under modern practice, as reflected in the unified single claim for relief doctrine.

The petitioner's action in the United States District Court retained Ellmyer, Apel and LaPlaga as defendants; it dropped the Township of Edison and Miller, McGinnis and Woerner as defendants; and it added as a new defendant, Marie Keller, the individual to whom the petitioner had issued his check, the non-payment of which resulted in his arrest and subsequent criminal proceedings. On March 5, 1968, the defendants Ellmyer, Apel and LaPlaga filed their answers, through their attorneys, Riker, Danzig, Scherer & Brown, and on March 14, 1968, the defendant Keller filed her answer through her attorneys, Meth & Wood.

The answers put into issue the substantial body of allegations of the plaintiff's complaint and, among other things, set forth the separate defense of *res judicata*, estoppel by judgment and statute of limitations.

On September 10, 1968, the defendant Keller noticed a motion for summary judgment. Actually, the motion combined three distinct claims for relief: (i) a motion for summary judgment based upon the grounds that the plaintiff had given his release to the defendant Keller; (ii) a motion to compel plaintiff's attorneys to withdraw from the case; and (iii) a motion to grant the defendant Keller relief by reason of the plaintiff's failure or refusal to timely supply answers to interrogatories. The application to compel plaintiff's counsel to withdraw from the case was based upon the fact that, while plaintiff asserted the release given to Keller was the product of duress [Third Count, ¶28], plaintiff's signature upon the release had been acknowledged under oath as having been voluntarily made and delivered before Mr. Holley, his attorney. Thus, Mr. Holley was an essential witness with respect to the fact question concerning the voluntariness with which plaintiff executed the general release which Mr. Holley had prepared and acknowledged. Further, with regard to the plaintiff's failure to submit to discovery, the motion papers indicated that interrogatories were served upon the plaintiff on or about April 17, 1968, and that answers had not been supplied as of the time the motion was made.

The motion by Keller was reached for argument on October 28, 1968, and at that time the case was in the following posture:

1. It had been pending for some 9½ months since the filing of the complaint on January 3, 1968.

2. All of the defendants had long since filed answers.

3. Efforts to obtain discovery from the plaintiff had been unsuccessful since he had failed and refused to submit answers to interrogatories, despite the fact that they were long overdue.

4. The case had already been noticed for a pretrial conference, and then adjourned by order of the court on September 25, 1968.

5. The defendants Ellmyer, Apel and LaPlaga had retained counsel, who had incurred substantial expense in the defense of the action and in the preparation of a motion for summary judgment, together with supporting brief, which they were about to notice and file.

6. Insofar as the local rules of court were concerned, the plaintiff was still represented by counsel. See *United States District Court, District of New Jersey, Local Rule* 18 ("Unless other counsel is substituted, appearance of counsel shall not be withdrawn except by leave of court in any action.").

On the return of the Keller motion plaintiff's attorneys of record failed to appear although plaintiff was still represented by counsel. *U.S.D.C., N. J., Local Rule* 18. At the start of the proceeding, the court announced that it had received a letter from plaintiff (copies of which were never supplied to defense counsel) expressing the desire that plaintiff wished to "withdraw" his action. Of course, counsel for defendants did not assume that "withdrawal" meant retreat in the face of impending defeat, with a reservation of rights to return to do battle again at any subsequent time found to be propitious by plaintiff. Rather, defendants requested costs as if they were a "prevailing party," (see *Fed. R. Civ. P.* 54,) and they withdrew the request only when it appeared that this would require them to wait in the courtroom in order to be reached for argument and decision on the motion for summary judgment which was pending.

The oral discussions, of course, did not technically result in a dismissal at that time, because it remained for the court to enter a written order of dismissal. On November 8, 1968, the court entered an order which directed that the action "be and is hereby dismissed with prejudice and without costs to any party." Thereafter, and pursuant to *Fed. R. Civ. P.* 77(b), notice of the entry of the final order was mailed to plaintiff's attorneys of record, Holley and Kroner (P4a). Unlike the New Jersey Court Rules (*Rule* 4:42-1), which had no applicability to the District Court action, the Federal Rules of Civil Procedure do not require that there be consent as to form, and consequently the order of dismissal was never submitted to plaintiff or his attorneys for that purpose.

After the entry of the final order of dismissal on November 8, 1968, and before making the motion for relief from the terms of that order (an interval of 19 months), the petitioner then apparently elected to shift his field of battle from a forum where he was about to sustain another defeat to a new forum which he apparently believed held more promise of success—the Committee on Claims of the Joint Legislative Appropriations Committee, State of New Jersey. In short, petitioner was engaged in the practice of starting and stopping litigation based upon his own judgments as to how that litigation appeared to be progressing at the moment and his own rationalizations as to which forum held more promise for success at a particular point in time. He pursued this course of conduct, apparently, because of a belief that our judicial process permits of this practice, and that he would be free to return to the abandoned forum and start anew if he failed in the new forum selected.

Petitioner apparently pursued his claim before the Subcommittee on Claims through to an unsuccessful con-

clusion, and then, unhappy with that result, instituted an entirely new action against the Subcommittee on Claims and the State of New Jersey in the United States District Court for the District of New Jersey, seeking damages under the Civil Rights Act, 42 *U.S.C.* §§1983-1986. Once again, he still apparently claimed relief on the basis of the same operative facts and transactions which had previously been litigated in the State and federal courts. That action was dismissed by the United States District Court, and the appeal was affirmed in a *per curiam* opinion. See *Gambocz* v. *Subcommittee on Claims, et al.,* No. 18315, appeal decided March 26, 1970.

Thereafter, having failed to obtain the relief he sought in seven stages of various proceedings, petitioner sought an order vacating the final order of dismissal which had been entered some 19 months previously, on November 8, 1968. In short, petitioner sought to establish a right to relief on the same operative facts and transactions which had already been adjudicated, in an eighth round of battle:

1. Superior Court of New Jersey, Law Division—adverse decision on the merits following trial.

2. Superior Court of New Jersey, Appellate Division—judgment below affirmed.

3. Supreme Court of New Jersey—petition for certification denied.

4. United States District Court, District of New Jersey (the instant action)—dismissed with prejudice on November 8, 1968.

5. Joint Subcommittee on Claims—claim rejected.

6. United States District Court, District of New Jersey (action against Joint Subcommittee)—dismissed.

7. United States Court of Appeals for the Third Circuit—dismissal affirmed.

Parenthetically, the petitioner has since pursued or instituted the following actions on the basis of the same operative facts and transactions upon which he has previously sought, and been denied, relief in the State and federal courts:

1. United States Court of Appeals for the Third Circuit (the instant action)—dismissal affirmed.

2. United States Court of Appeals for the Third Circuit (the instant action)—petition for rehearing denied.

3. United States District Court, District of New Jersey (action against attorneys who successfully defended petitioner's original action in District Court)—pending.

4. United States District Court, District of New Jersey (action against all parties who were defendants in the original District Court action, together with other parties who could or should have been parties in that action)—pending.

5. Superior Court of New Jersey, Chancery Division (action against Township of Edison for production of employment records of Marie Keller)—pending.

Apparently, petitioner contends that the basic principle of guaranteeing to every citizen one single unified claim for relief, to be pursued in one integrated action through to a final conclusion on the merits, is not adequate to protect his needs; rather, petitioner seems to contend that nothing will be adequate in his case but the achievement of the result he desires, and if this requires litigation *ad infinitum*, then that too should be afforded to him.

ARGUMENT

POINT I

There are no special and important reasons for granting review on certiorari.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." *Rule 19, Supreme Court Rules.* There are no special and important reasons for granting review on certiorari in this case. Accordingly, the petition should be denied.

POINT II

The petition presents no cognizable questions for review.

The questions presented by the petitioner (P2-3) were not raised before nor passed upon by the District Court; they were not raised before nor passed upon by the Circuit Court; they proceed wholly upon erroneous assumptions and inferences of fact; and they are frivolous as a matter of law. Accordingly, the petition should be denied.

POINT III

The District Court (and the Circuit Court, by reason of its affirmance) did not abuse its discretion when it denied petitioner's motion for relief from a final order.

The petitioner's motion of May 11, 1970, although not clearly designated as such, was an application for relief pursuant to *Fed. R. Civ. P.* 60(b), "from a final judgment, order, or proceeding . . ." As such, the application was addressed to the sound discretion of the trial court, the exercise of which should not be disturbed on appeal except in cases of evident abuse. See *Bridoux* v. *Eastern Air Lines,* 214 F. 2d 207 (D. C. Cir. 1954); *Assman* v. *Fleming,* 159 F. 2d 332 (8th Cir. 1947); *Farmers Co-Op.* v. *Strand,* 382 F. 2d 224 (8th Cir. 1967); *Hines* v. *Seaboard Airline R. Co.,* 341 F. 2d 229 (2d Cir. 1965). The discretion of the District Court was most certainly not abused when that court denied the petitioner's application [see *Ackermann* v. *United States,* 304 U. S. 193 (1950); *Rinieri* v. *News Syndicate Co.,* 385 F. 2d 818 (2d Cir. 1967); *Rhodes* v. *Houston,* 258 F. Supp. 546 (D. C. Neb. 1966)], and the discretion of the Circuit Court was most certainly not abused when that Court affirmed the determination of the District Court.

The petitioner's application for relief from the final order was clearly not based upon the grounds in sections (2) (newly discovered evidence), (4) (judgment void) or (5) (judgment satisfied) of Rule 60(b), and the application, whether founded upon the grounds specified in sections (1) (mistake) or (3) (fraud) of the Rule, was clearly barred by the one-year limitation, which could not have been extended by the court. *See, e.g., Ackermann*

v. *United States, supra; Boehm* v. *Office of Alien Property,* 344 F. 2d 194 (D. C. Cir. 1965); *Rhodes* v. *Houston, supra.*

By process of elimination, then, it is apparent that the petitioner relied solely upon Rule 60(b)(6) ("any other reason") as the basis of his application; but that provision had no applicability under the facts and circumstances of this case.

When the petitioner's position with respect to Rule 60 (b)(6) is subjected to careful analysis, it can be distilled into the following proposition: Litigants should be free to start and stop litigation involving the same claim for relief arising out of the same operative facts or transactions against the same parties and those with whom they are in privy for the purpose of enabling themselves to switch their field of battle from one forum to another whenever their own rationalizations indicate that such a switch will work to their advantage and, simultaneously, they should be free to preserve their right to return at a later date to the forum previously abandoned should such a subsequent return prove to be propitious as a result of having encountered failure in the other forum. The well-reasoned opinions in *Ackermann* and *Rinieri, supra,* establish rather conclusively that the relief for "any other reason" provided by Rule 60(b)(6) was not intended to provide relief under such circumstances.

Quite to the contrary, the petitioner's proposition demonstrates why, under all the facts and circumstances, equity and justice now dictate that the Township of Edison, the members of its police department, its municipal court clerk, Mrs. Keller, the Subcommittee on Claims, and the State of New Jersey finally be relieved from the vexacious multiplicity of expensive litigation with which the petitioner has confronted them over the past 5 years.

CONCLUSION

It is respectfully submitted that the policies of the law underlying the single claim for relief doctrine and the finality of judgments doctrine coalesce and mandate that the petitioner should not be granted relief from the final order of November 8, 1968; that the discretion of the District Court in denying that relief was properly exercised; that the discretion of the Circuit Court in affirming the determination of the District Court was properly exercised; and that the petition for review on certiorari, under all of the facts and circumstances, presents no special and important reasons for such review. Accordingly, it is respectfully submitted that the petition for review on certiorari should be denied.

RIKER, DANZIG, SCHERER & BROWN,
Attorneys for the Respondents Ellmyer, Apel and La Plaga.
By: DICKINSON R. DEBEVOISE
A Member of the Firm.

DICKINSON R. DEBEVOISE
Of Counsel.

PETER N. PERRETTI, JR.,
FRANK J. MIELE,
On the Brief.

APPENDIX

Complaint and Demand for Trial by Jury (Re: Superior Court of New Jersey)

(Filed—March 8, 1966)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MIDDLESEX COUNTY

DOCKET No. L-

Civil Action

BILL J. GAMBOCZ,

Plaintiff,

vs.

LILLIAN APEL, LOUIS LA PLAGA, JOHN W. ELLMYER, JR., GEORGE MILLER, RICHARD MCGINNIS, THEODORE C. WOERNER, and THE TOWNSHIP OF EDISON, a municipal corporation,

Defendants.

The Plaintiff, Bill J. Gambocz, residing at No. 1028 Amboy Avenue, in the Township of Edison, County of Middlesex, State of New Jersey, says:

1. On or about the first day of June, 1965, the Plaintiff was elected in a political primary to run for the office

of Mayor of the Defendant, The Township of Edison, in the County of Middlesex, State of New Jersey, then living and maintaining a business in said township for many years and enjoying a good name, the respect of his neighbors, a successful business relation and a favorable standing in the community.

2. The Defendant, Louis La Plaga, is a police officer employed by the Defendant, The Township of Edison.

3. The Defendant, George Miller, is a lieutenant employed on the police force of the Defendant, The Township of Edison.

4. The Defendant, Richard McGinnis, is a police officer employed by the Defendant, The Township of Edison.

5. The Defendant, John W. Ellmyer, Jr., is the Police Chief for the police department in the jurisdiction of the Defendant, The Township of Edison.

6. The Defendant, Theodore C. Woerner, is a police officer employed by the Defendant, The Township of Edison.

7. The Defendant, Lillian Apel, is the Court Clerk for the municipal court, acting in and for the Defendant, The Township of Edison.

FIRST COUNT

8. On or about the 30th day of August, 1965, the Defendant, Louis La Plaga, during and in the course of his employment, did have certain conversations with a person

known as Marie Keller and as a result, the said Defendant, Louis La Plaga, did take a certain $55 check drawn in May of 1964 by the Plaintiff to the police headquarters of the Defendant, The Township of Edison.

9. The said Defendant, Louis La Plaga, did then and there confer with the Defendant, John W. Ellmyer, Jr. and they did agree, maliciously, and in order to pervert the law, that they would attempt to utilize the criminal processes of the courts of the State of New Jersey for the purpose of embarassing the Plaintiff in his standing in the community and injuring his good name, reputation and credit.

10. The Defendant, John W. Ellmyer, Jr., acting for the Defendant, The Township of Edison, in this and all future actions alleged, did thereupon dispatch the Defendant, Louis La Plaga, contrary to the usual processes, in a municipal vehicle to obtain the said Marie Keller and did thereupon transport her to police headquarters.

11. The Defendant, John W. Ellmyer, Jr., did thereupon, on or about the 31st day of August, 1965, maliciously and in order to pervert the criminal processes of the State of New Jersey, advise the said Marie Keller that the only way that she could collect $55 from the Plaintiff, as a civil debt, was to press charges in the form and manner in which she was advised through the police department and the said Defendant, John W. Ellmyer, Jr. did further advise the said Marie Keller, maliciously and as a perversion of the criminal processes that there was only a two year statute of limitations in which to collect the said

money from the Plaintiff paid the money to the said Marie Keller's deceased husband, and that the said Marie Keller should accompany the Defendant, Louis La Plaza, to the office of an attorney at law of the State of New Jersey, who was also attorney for the Board of Adjustment of the Defendant Township of Edison of the Planning Board for the Defendant Township of Edison and from time to time acting Town Attorney and acting Clerk of the Defendant, Township of Edison and who was also campaign manager for the re-election of the incumbent Mayor of the Defendant Township of Edison, who was running in an opposite political party against the Plaintiff in November of 1965.

12. The Defendant, Township of Edison, through its officers and agents caused the said Marie Keller to be driven by police car to the office of R. Joseph Ferenczie, who in turn advised the said Marie Keller, in the presence of the Defendant, Louis La Plaza, not to collect the money from the Plaintiff that she alleged was due but to follow the procedure recommended to her by the Defendants, Louis La Plaza and John W. Ellmyer, Jr.

13. Thereupon the Defendants, John W. Ellmyer, Jr., George Miller and Louis La Plaga, caused the said Marie Keller to give a statement concerning her alleged debt against the Plaintiff and to sign, maliciously, and as a perversion of the processes of criminal procedure in New Jersey a Complaint in blank purporting to be a sworn Complaint before the Defendant, Lillian Apel, who did maliciously and as a perversion of the criminal processes of the State of New Jersey purport to sign a jurat stating

that the said Marie Keller had sworn to said criminal Complaint.

14. The said Defendant, Louis La Plaga and John W. Ellmyer, Jr., in the course of obtaining the said action from the said Marie Keller, did discuss and offer to the said Marie Keller a job as a school crossing guard and to give her applications for that purpose as an additional inducement to carry out their malicious scheme to pervert the processes of justice in New Jersey.

15. Thereafter the Defendant, John W. Ellmyer, Jr. did cause the Defendants, Richard McGinnis and Theodore C. Woerner, maliciously, and as a perversion of the criminal processes of the State of New Jersey, to go to the home of the Plaintiff's elderly mother and father and to announce that the police were searching for their son, so as to cause great pain and suffering, fear, physical suffering, shock and mental anguish to the Plaintiff and his parents, even though the said Defendants knew that the Plaintiff resided and maintained a business at No. 1028 Amboy Avenue, in the Township of Edison, County of Middlesex, State of New Jersey, and had done so for a number of years and lived separate and apart from the said parents and even though the said Defendants knew that the Plaintiff was available and in fact running for public office in the said township and had no reason to search out the Plaintiff other than to embarrass him and cause the aforesaid damage.

16. On or about the 31st day of August, 1965, several newspapers in the vicinity of the Township of Edison did receive anonymous tips as to criminal proceedings being

taken against the Plaintiff but the desk sergeant employed by the Defendant, The Township of Edison, and police headquarters, refused, in the normal and proper course of police proceedings to release any information concerning the same until the Defendant, John W. Ellmyer, Jr., did maliciously and as a perversion of the criminal processes of the State of New Jearsey, telephone the said desk sergeant and order him to make public to the newspapers the confidential statement given against the Plaintiff in a pending criminal matter before the municipal court of the Defendant. The Township of Edison, so as to embarrass the Plaintiff, interfere with his advantageous economic relation, cause him pain and suffering, scorn and ridicule, loss of standing in the community and loss of his good name, fame and credit and otherwise injure him.

17. As a result of the malicious use of the criminal processes of the State of New Jersey by the aforesaid Defendants, the Plaintiff has suffered greatly in his name and reputation, in his business, in his standing in the community, and he has further suffered mental anguish, and he has been forced to incur large legal fees and expenses, and he has been permanently injured in his ability to earn his livelihood as a real estate broker and an insurance broker and in the field of real estate consultation, and he has been injured in his ability to run for or hold public office.

WHEREFORE, the Plaintiff demands judgment against the Defendants, Lillian Apel, Louis La Plaga, John W. Ellmyer, Jr., George Miller, Richard McGinnis, Theodore C. Woerner and the Township of Edison, a municipal cor-

poration, jointly and separately, for compensatory and punitive damages plus costs of suit.

SECOND COUNT

18. The Plaintiff repeats and realleges all of the allegations of the First Count of the Complaint and makes them a part hereof as if more fully set forth.

19. The Defendants, on and about the 30th and 31st days of August, 1965, did meet and conspire together maliciously for the purpose of harming the Plaintiff in his standing in the community, in business relations, opportunity to run for elective office and the like through an abuse of the processes of the municipal court of the Defendant, The Township of Edison, all while the said Defendants were employed and acting within the scope of their employment by the said Defendant, Township of Edison.

20. The said Defendants did do and perform the things and deeds as set forth in the First Count of the Complaint in the course of carrying out the said conspiracy, to maliciously injure the Plaintiff.

WHEREFORE, the Plaintiff demands judgment against the Defendants, Lillian Apel, Louis La Plaga, John W. Ellmyer, Jr., George Miller, Richard McGinnis, Theodore C. Woerner and the Township of Edison, a municipal corporation, jointly and separately, for compensatory and punitive damages plus costs of suit.

HOLLEY AND KRONER, ESQS.
Attorneys for Plaintiffs
123 Cleveland Street
Orange, New Jersey
By LEE A. HOLLEY, ESQ.

Complaint and Demand for Trial by Jury
(Re: Superior Court of New Jersey)

The Plaintiff herein demands and requests trial by jury on all issues in this Complaint.

HOLLEY ANI KRONER, ESQS.
By LEE A. HOLLEY, ESQ.

Dated: March 4, 1966

Complaint and Demand for Trial by Jury (Re: United States District Court)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CASE NO.

Civil Action

BILL J. GAMBOCZ,

Plaintiff,

vs.

JOHN W. ELLMYER, JR., LILLIAN APEL, LOUIS LA PLAGA and MARIE KELLER,

Defendants.

The Plaintiff, Bill J. Gambocz, residing at 526 Jacques Street, in the City of Perth Amboy, County of Middlesex, State of New Jersey, says:

1. This court has jurisdiction over the subject matter of this suit, pursuant to the provisions of §1983 and §1985 of Title 42, United States Code, and §1331 and §1343 of Title 28, United States Code.

2. The matters in controversy arise under the Constitution of the United States and exceed the sum of Ten Thousand ($10,000) Dollars, exclusive of interest and costs of suit.

Complaint and Demand for Trial by Jury
(Re: United States District Court)

FIRST COUNT

3. In and about the month of June, 1965, the Plaintiff, Bill J. Gambocz, was duly elected in a primary election to run for the office of Mayor of the Township of Edison, New Jersey, as a Republican candidate.

4. Thereafter, the Plaintiff commenced, pursuant to his rights of free speech, assembly and political freedom guaranteed to him by the United States Constitution, to wage a vigorous campaign against the incumbent Democratic administration of Edison, New Jersey.

5. The Plaintiff was then living and maintaining a business within said Township of Edison, as he had been doing for many years, where he enjoyed a good name, the respect of his neighbors, successful business relations and a favorable standing in the community.

6. The Defendants, John W. Ellmyer, Jr. and Louis La Plaga, respectively Chief and Patrolman, are and were during all pertinent times, members of the Police Department of the Township of Edison, which department was maintained under the control of the political opponent of Plaintiff, and said Defendants committed all acts pertinent herein under color of law and authority of the State of New Jersey.

7. The Defendant, Lillian Apel, is and was during all pertinent times Court Clerk of the Municipal Court of the Township of Edison, having been appointed to said position by the local magistrate, which court was appointed by the opponent of Plaintiff, and in fact was a person al-

leged by Plaintiff in public pronouncements pursuant to his rights of free speech as a citizen of the United States to have direct or indirect interest in certain improper land dealings with the Township of Edison.

8. On or about the 30th day of August, 1965 the Defendant did meet and confer with the Defendant, Marie Keller, who was a private citizen and widow of one Leroy Keller, the latter being a deceased close friend Plaintiff and holder of an unpaid $55 check written in May of 1964 for a past consideration.

9. As a result of said meeting, the Defendants, Louis La Plaga and John W. Ellmyer, Jr. did meet and confer, and on or about the 30th and 31st days of August did unlawfully conspire for the purpose of injuring Plaintiff to impede, hinder, obstruct and defeat the true course of justice, to deny Plaintiff equal protection of law, to injure Plaintiff in his person and property by arbitrary and discriminatory acts under color of law and authority, to deny Plaintiff his constitutional rights of free speech, assembly and political freedom, to cause criminal processes and incarceration for the mere owing of civil debts, to utilize the powers of the State of New Jersey to deny political freedom of Plaintiff to run for office and citizens of Edison to have a *bona fide* general election, and to deny Plaintiff in criminal matters due process of law and equal privilege and immunities of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

10. Pursuant to said conspiracy, the said Defendants, John W. Ellmyer, Jr. and Louis La Plaga did contrive to send Louis La Plaga to the home of the Defendant, Marie

Keller, in order to induce her to come to police headquarters to file a criminal complaint, under color of law and state authority, and to cause criminal processes and incarceration to be undertaken for mere civil indebtedness and for no criminal action.

11. The said Defendants thereupon did contrive to get Defendant Marie Keller, to join their illegal conspiracy by having her wrongfully undertake to utilize the criminal processes of the State of New Jersey as a way of extorting from the Plaintiff $55 which he alleged he did not owe, or alternatively, said Defendant, John W. Ellmyer, Jr. did falsely and fraudulently conceal from Defendant, Marie Keller, the criminal nature of proceedings.

12. On or about the 31st day of August, 1965, the Defendant Marie Keller, did join in and assist the Defendants, Louis La Plaga and John W. Ellmyer, Jr. in the illegal conspiracy, following inducements of discussions of a part time job for the said Marie Keller, advice concerning law from John M. Ellmyer, Jr., and a conference arranged by the said Louis La Plaga and John W. Ellmyer, Jr., with Joseph Ferenzi, Esq., attorney and clerk for the said Township of Edison and campaign manager of Plaintiff's opponent, the incumbent Democratic Mayor, all of which was designed to induce and did effect an improper criminal process to be issued and prosecuted against Plaintiff.

13. On or about the 31st day of August, 1965, the Defendant, Lillian Apel, did join the other said Defendants in the aforesaid conspiracy, for the above purposes, and

said Defendants did cause and procure, or assist in causing and procuring the issuance of a criminal complaint and warrant, unsupported by oath or affirmation, contrary to due process of law, equal protection of law, and the privileges and immunities of a United States' citizen as guaranteed by the Fourteenth Amendment of the United States Constitution.

14. Pursuant to said illegal warrant, the Defendants caused police officers to go to the home of Plaintiff's aged parents, out of the jurisdiction of the said Edison police force, without probable cause, and so as to further the above purposes of the conspiracy, and to retaliate against Plaintiff's exercise of his rights and to "teach" him not to act freely, and as a result thereof, Plaintiff was greatly injured in his relations with his father and mother, and in particular, Plaintiff was deprived of the companionship of his father, thereafter, who was rendered into such a state of shock as to cease further communications with Plaintiffs and others, and to become greatly impaired physically, thereby causing Plaintiff great mental anguish and suffering.

15. Pursuant to said illegal conspiracy, for the aforesaid illegal purposes, Defendants caused or allowed, contrary to due process of law, equal protection of law, and the privileges and immunities of a United States citizen. all as secured by the Fourteenth Amendment to the United States Constitution, and specifically contrary to Plaintiff's right to have his criminal rights determined in an atmosphere of calm and free from undue publicity and partisan *ex parte* condemnation, the release of the state-

ment of Defendant, Marie Keller, given to the Edison Police as to the press on the very day of obtaining the same, along with other pertinent facts regarding the entire illegal prosecution.

16. As part of the aforesaid conspiracy, Defendants procured the criminal complaint, with artifice and tricks, using police-state tactics, and caused the said Marie Keller to sign a blank complaint without any understanding or knowledge of the crime charged, the elements involved in said crime, and without having suggested to said Defendants, as police or court personnel, facts to support the crime charged, and without the usual procedures or investigations utilized in said cases regarding an unsatisfied check, given for past consideration, without protest, and issued when ample funds were upon deposit, so as to deprive Plaintiff of any accuser of a crime of which he was in fact accused, contrary to the Fourteenth Amendment of the United States Constitution.

17. As part of the aforesaid conspiracy, the Defendants caused the Plaintiff to be brought before a co-conspirator, or one who joined in the said conspiracy, but who is not made a party herein by reason of the doctrine of judicial immunity, Andrew Desmond, Esq., acting as Magistrate of the Municipal Court of the Township of Edison, who refused to dismiss the illegal complaint, without due process of law, equal protection of law, and the privileges and immunities guaranteed to the Plaintiff under the United States Constitution, but rather through bias, prejudice and an intent and purpose to further the aforesaid conspiracy, so as to mislead the public into believing that

Plaintiff had defrauded the Defendant, Marie Keller, without probable cause.

18. Pursuant to the aforesaid conspiracy, the Defendant, John W. Ellmyer, Jr. refused to allow the Defendant, Marie Keller, to dismiss her complaint, upon her discovery of the illegal purpose and scheme, and, instead, the said Defendant did thereafter undertake efforts to see that the illegal complaint and charges were not dismissed prior to the general election in November, 1965, and undertook certain efforts in that regard, known to Plaintiff, and, in fact, the said illegal complaint was not presented to the Middlesex County Grand Jury in regular order for dismissal but was held until after the Plaintiff was defeated at the polls for the dismissal in due course of said illegal and void complaint, upon other unknown and immune persons joining in the said conspiracy, and following said general election the illegal, void and unsupported criminal complaint was rejected for indictment by the Grand Jury.

19. As a result of the aforesaid conspiracy the Plaintiff was in fact denied rights guaranteed to him pursuant to the Fourteenth Amendment to the United States Constitution, was subjected to a criminal complaint and warrant unsupported by oath and affirmation, was deprived of a judicial tribunal free of bias, prejudice and corruption, was denied criminal processes free from police state tactics and free from political motivation and control, was further denied criminal processes uncorrupted by intentional prejudicial and undue publicity, and was further subjected to a void, fraudulent criminal attack and arrest.

was further arrested and imprisoned for a mere alleged civil debt without any charge of criminal conduct, all of which injured Plaintiff greatly in his name and reputations, in his business, in his standing in the community, in his relationship with his family and friends, in his mental health, and in his advantageous economic relationships and prospective profits, and all of which caused Plaintiff to suffer great mental anguish and shame, forced Plaintiff to undergo large legal expenses and fees and court costs, has permanently injured Plaintiff in his ability to continue to earn a living as a trusted real estate broker, insurance broker and real estate appraiser and consultant and in his ability to participate in community affairs and run for public office, has caused Plaintiff to lose credit forcing him to lose over Three Hundred Thousand Dollars in business loans and debts and to lose additional prospective profits, has prevented Plaintiff permanently from obtaining gainful employment or professional standing and has caused Plaintiff to suffer the loss of his valuable business and residential real estate and personal property.

WHEREFORE, the Plaintiff demands judgment against the Defendants, John W. Ellmyer, Jr., Lillian Apel, Louis La Plaga and Marie Keller, jointly and severally, for compensatory and punitive damages, plus costs of suit.

SECOND COUNT

20. The Plaintiff repeats and realleges all of Paragraphs 1 through 19 of the First Count and makes them a part hereof as if more fully set forth.

Complaint and Demand for Trial by Jury
(Re: United States District Court)

21. The Defendants, Lillian Apel and John W. Ellmyer, Jr., under color of law and authority of the State of New Jersey, and pursuant to the custom, uses and regulations thereunder, did subject Plaintiff or cause Plaintiff to be so subjected, as a citizen of these United States, to a deprivation of rights guaranteed to him by the Fourteenth Amendment of the United States Constitution, to wit, of his right to only be subjected to a warrant supported by oath or affirmation; of his right to be confronted by his accuser through the use of a blank, unsworn criminal complaint, of his right to be arrested and imprisoned for the mere allegation of a civil debt; of his right to be free of bias, prejudice, corruption and political acts or police-state acts in the criminal processes of the State of New Jersey; of his right to have his aged parents left undisturbed in the sanctuary of their home, free from retaliatory and fear provoking acts resulting from Plaintiff's free exercise of speech and political activities; of his right to speak, assemble and exercise political acts freely and without arbitrary discrimination, and insidious totalitarian tactics.

22. The said Defendants did accomplish or assist in accomplishing the aforesaid corrupt, political and discriminatory acts and deeds, arbitrarily and as an abuse of their offices so as to deny Plaintiff due process of law, equal protection, privileges and immunities of law as so secured to Plaintiff as a citizen of these United States.

WHEREFORE, The Plaintiff demands judgment against the Defendants, Lillian Apel and John W. Ellmyer, Jr., jointly and severally, for compensatory and punitive damages, plus costs of suit.

Complaint and Demand for Trial by Jury
(Re: United States District Court)

THIRD COUNT

23. The Plaintiff repeats and realleges all of the allegations of Paragraphs 1 through 22 above and makes them a part hereof as if more fully set forth.

24. On or about the 31st day of August, 1961 the Defendant, Marie Keller, did declare and agree that she did not intend or desire, nor did he understand the nature of the criminal acts taken against the Plaintiff but she did all acts only for the purpose of collecting $55 from the Plaintiff which she alleged was owing to her deceased husband, and sought merely in all acts to obtain the sum of $55 from Plaintiff, especially in view of a recent loss to her automobile, unrelated to Plaintiff.

25. The Defendants, Lillian Apel, Louis La Plaga and John W. Ellmyer, Jr., did join and conspire with the Defendant, Marie Keller, for their own illegal and corrupt purposes but did assist her in her improper and illegal acts as hereafter alleged.

26. The Defendant, Marie Keller, pursuant to the illegal conspiracy, as aforesaid, did falsely, maliciously and without probable cause, institute criminal proceedings against Plaintiff, on or about the 31st day of August, 1965.

27. The said proceedings terminated in favor of Plaintiff in or about the month of November, 1965.

28. The said Defendant, Marie Keller, did coerce and force Plaintiff, without consideration and under duress of further embarassing Plaintiff publicly and further attempt-

ing to procure criminal proceedings, to execute a release in her favor, barring Plaintiff from any legal action against her, and Plaintiff did execute and deliver such a release, involuntarily, but under the coercion, duress and unconscionable conduct of said Defendants.

WHEREFORE, the Plaintiff demands judgment against the Defendants, Marie Keller, Lillian Apel, Louis La Plaga, and John W. Ellmyer, Jr., as follows:

(a) ordering and adjudging that any release given by Plaintiff to Marie Keller be rescinded and the same be and declared to be null and void;

(b) ordering judgment generally for compensatory and punitive damages plus costs of suit.

FOURTH COUNT

29. The Plaintiff repeats and realleges all of the allegations of Paragraphs 1 through 22 above and makes them a part hereof as if more fully set forth.

30. The Defendants, Lillian Apel, Louis La Plaga and John W. Ellmyer, Jr., acted pursuant to the aforesaid conspiracy, in a manner similar to action undertaken against prior minority candidates against the incumbents, and so as to interfere maliciously with the performance of Plaintiff's business as a real estate broker, insurance broker, and real estate investor, about which all said Defendants had knowledge, and further, so as to interfere maliciously with the prospective economic advantages held by Plaintiff, reasonably, under his circumstances.

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31. The acts and deeds of said conspiracy did so interfere maliciously, causing the damage as aforesaid.

WHEREFORE, the Plaintiff demands judgment against the Defendants, Lillian Apel, Louis La Plaga and John W. Ellmyer, Jr., jointly and severally, for compensatory and punitive damages, plus costs of suit.

HOLLEY AND KRONER
Attorneys for Plaintiff
By LEE A. HOLLEY, ESQ.

The Plaintiff hereby requests and demands trial by jury on all issues in this matter, as pleaded or to be pleaded.

LEE A. HOLLEY, ESQ.